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No. 99-___

In The

Supreme Court of the United States

CENTRAL MAINE POWER COMPANY,

Petitioner,

v.

MAINE PUBLIC UTILITIES COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a State administrative rule that compels a utility to disseminate the regulator's core speech, including "corrections" to the utility's own protected core speech, and that permits the regulator to enjoin the utility's core speech, violates the utility's rights under the First and Fourteenth Amendments.

The Maine Supreme Judicial Court held that the Maine Public Utilities Commission ("PUC") can require a utility to (1) distribute the PUC's non-commercial educational speech in the utility's billing envelope, and (2) "correct" and enjoin any of the utility's own non-commercial educational speech. Acknowledging that such regulations are content-based restrictions on core speech, the Maine Court nevertheless upheld them because it concluded that (1) the speech involved is "objective"; and (2) the State's concern that citizens will be "confused" if exposed to differing messages on an issue of public concern constitutes a compelling state interest. Review by this Court is critical because the Maine Court's decision is not isolated, and the subject matter of the challenged core speech regulation, electric industry restructuring, is occurring throughout the nation.

CORPORATE DISCLOSURE STATEMENT AND PARTIES BELOW

The parties to the appeal before the Maine Supreme Judicial Court were Central Maine Power Company and the Maine Public Utilities Commission. The Maine Office of Public Advocate, the Independent Energy Producers of Maine and the Maine Civil Liberties Union filed *amici* briefs below.

Central Maine Power Company's stock is not publicly traded. The stock of Central Maine Power Company's parent holding company, CMP Group, Inc., is publicly traded. CMP Group is in the process of merging into Energy East Corporation and is awaiting necessary regulatory approvals for the transaction. Energy East's stock is publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Central Maine Power Company ("CMP") respectfully petitions for a writ of certiorari to review the decision of the Maine Supreme Judicial Court, sitting as the Law Court, in this case.

OPINIONS BELOW

CMP challenged a Rule issued by the Maine Public Utilities Commission ("PUC"). The opinion of the Maine Supreme Judicial Court striking down Section 6(B) of the Rule, but affirming the constitutionality of Sections 6(C) and 7, is reported at *Central Maine Power Co. v. Public Utilities Commission*, 1999 ME 119, 734 A.2d 1120. The opinion is reprinted in the Appendix hereto ("App.") at 1-21.

The PUC's order adopting the challenged rule ("Order Finally Adopting Rule and Statement of Factual and Policy Basis," dated April 22, 1998) and the challenged rule are reprinted at App. 22-35.

JURISDICTION

The challenged, final opinion of the Maine Supreme Judicial Court was issued on July 29, 1999.[1] This Court's jurisdiction rests upon 28 U.S.C. § 1257.

ADMINISTRATIVE RULES INVOLVED

CMP challenges Sections 6(C) and 7 of Chapter 302 of the PUC's administrative rules ("Rules"):

> **§ 6 UTILITY-SPONSORED EDUCATIONAL ACTIVITIES**
>
> * * * *
>
> C. ***Investigation***. The Commission may investigate any utility-sponsored educational activity if it finds after a summary investigation that there are sufficient grounds to investigate whether the activity is misleading, deceptive or inaccurate. If after a public hearing, the Commission finds that the utility-sponsored activity is misleading, deceptive or inaccurate, it may by order require the utility to cease the activity and provide corrections of that activity.

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[1] Although the Maine Supreme Judicial Court "vacated and remanded" to the PUC, the remand was only for the purpose of excising Section 6(B) of the Rule, which the Maine Court found was an unconstitutional prior restraint of utilities' core speech. Since the Maine Court upheld the portions of the Rule which CMP challenges here and did not order the PUC to take any additional action with respect to the challenged provisions on remand, the Maine Court's decision is final.

§ 7 DISSEMINATION OF INFORMATION

The Commission may require that electric and transmission and distribution utilities disseminate information produced as part of the Commission's consumer education program. Information required to be disseminated by the utility may include correction of any utility-sponsored education activity to the extent such correction is required by the Commission as a result of an investigation, undertaken pursuant to section 6(C).

(App. at 33.)

Sections 2(A) and (D) of the Rule, which are not challenged here, define the terms "Consumer Education Program" and "Utility-Sponsored Education Activity" referenced above:

A. ***Consumer Education Program.*** Consumer education program means the program, undertaken, sponsored or expressly authorized by the Commission, to educate consumers about the implementation of electric industry retail access and its impact on consumers.

D. ***Utility-Sponsored Education Activity.*** Utility-sponsored educational activity means an activity that is not part of the consumer education program and that is initiated and sponsored by an electric or transmission and distribution utility to educate consumers about retail access.

(App. at 27.)

INTRODUCTION

This Petition for a Writ of Certiorari challenges a decision of the Maine Supreme Judicial Court, sitting as the Law Court (the "Law Court" or "Maine Court"),

upholding two provisions of a Rule adopted by the PUC. These two provisions (1) require utilities to disseminate and associate with the PUC's educational speech on the subject of electric industry restructuring; and (2) allow the PUC to correct and enjoin the utilities' own protected speech on restructuring.

While acknowledging that the Rule constitutes content-based regulation of core speech, the Law Court nevertheless sustained these two provisions against First Amendment challenge because it found that the Rule withstood strict scrutiny as a narrowly tailored means of advancing a compelling governmental interest. The identified governmental interest was avoiding public confusion on the subject of the legislated restructuring. The Maine Court found that the strict scrutiny test was met because it saw this interest as compelling and found that the speech involved was "objective."

This Court should review the Law Court's decision for three reasons. First, the decision conflicts with established federal precedent by (a) creating a broad "objectivity" test to allow compulsion, correction and enjoinder of core speech; and (b) concluding that avoidance of public confusion on a political act is a compelling state interest. Second, the decision wrongly decided an important Free Speech issue left open by this Court in *Pacific Gas & Electric Co. v. California PUC*, 475 U.S. 1 (1986) and its progeny – to what extent can the government regulate, through compulsion, correction and injunction, non-commercial speech that may include informational qualities. Finally, given the nature of the Maine Court's decision, and the breadth of electric industry restructuring ongoing throughout the nation, the decision is likely to have

broad impact, not only in the specific area of restructuring, but on all core speech from or associated with any regulated entity. Other decisions emerging on the same restructuring issue already reflect this phenomenon.

STATEMENT OF THE CASE

Electric service in the United States has historically been provided by vertically integrated electric utilities, whose services and prices have been regulated by state and federal regulatory agencies. These utilities have been responsible for each element of electric service: generation, transmission and distribution to retail consumers. In this historical setting, there was no competitive market. Instead, there was a regulatory bargain: the utility was given a territory to serve free from direct competition with other electric utilities; in exchange the utility's electric rates and rate of return on investment were regulated to provide the utility an opportunity for a fair rate of return.

In 1997, Maine, like many other states, legislated a fundamental restructuring of the State's electric industry, ending the regulatory bargain at the generation level and creating competition at that level. (App. at 2; 35-A M.R.S.A. §§ 3201-3217 (Supp. 1998).) As of March 1, 2000, Maine's electric utilities can no longer generate electricity; they will retain their responsibility for providing transmission and distribution ("T&D") services. (App. at 2; 35-A M.R.S.A. § 3204(1).) Thus, while everyone else can compete, the Maine law – which forces integrated utilities like CMP to divest generation assets – prohibits these utilities from participating in that competition. CMP will

only be permitted to transmit and distribute electricity generated by others. (App. at 2-3.)

Although T&D utilities like CMP are prohibited from competing at the generation level, they will be allowed to have an affiliated competitive service provider. The relationship between the T&D and its affiliate, however, is subject to thorough regulation, including a 33% market share cap on the amount of electricity the affiliate can sell within the T&D utility's service territory. *See* 35-A M.R.S.A. § 3205(2)(B). Related regulations include prohibition of any (1) joint marketing between T&D utilities and their affiliated competitive service providers (*id.* § 3(H)); and (2) T&D employee from providing any customer or potential customer any opinion regarding the reliability, qualifications, operations capability or customer service record of any affiliated or nonaffiliated competitive service provider (*id.* § 3(J)).

Such electric industry restructuring, ongoing throughout the nation, is a topic that has engendered widespread controversy. *See, e.g.*, Jonathan A. Lesser, *Distribution Utilities: Forgotten Orphans Of Electric Restructuring?*, 137 Pub. Utils. Fort. 50 (1999); Carl J. Levesque, *Electric Restructuring: Second Wave, Second Thoughts*, 136 Pub. Utils. Fort. 54 (1998); Stanley A. Klein, *Silicon Crisis? How Information Technology Poses Risks For Electric Restructuring*, 136 Pub. Utils. Fort. 36 (1998).

Given the breadth and impact of this fundamental change in the energy market on Maine citizens, the Maine Legislature required the PUC to adopt rules implementing a consumer education program. (App. at 4; 35-A M.R.S.A. § 3213(2).)

On November 3, 1997, the PUC issued a Notice of Rulemaking, requesting comments on its proposed consumer education rules. *Public Utilities Commission, Rulemaking: Consumer Education Program (Chapter 302)*, Docket No. 97-583 (Me. P.U.C. Nov. 3, 1997). CMP filed Comments, stating that Sections 6 and 7 of the proposed rule imposed unconstitutional restrictions on electric utilities' rights to free speech. CMP appeared at a public hearing on the proposed rule and again raised its constitutional concerns with the PUC.

Shortly thereafter, on January 30, 1998, the PUC issued an Order Provisionally Adopting Rule and Statement of Factual and Policy Basis. ("Provisional Order".)[2] The Provisional Order generally described the provisionally adopted rule and addressed the Comments filed by the various parties to the proceeding. The rule as provisionally adopted was attached to the Provisional Order.

On or about March 30, 1998, the provisionally adopted rule was approved by the Maine Legislature, on the condition that certain modifications be made that are not material here. (Me. Resolves 1997, ch. 99.) The PUC made the required amendments and adopted the rule as

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[2] Consumer education rules are "major substantive rules." *See* 35-A M.R.S.A. § 3213(2)(C) (Supp. 1998). This means that they must undergo Legislative review before final adoption by the agency. *See* 5 M.R.S.A. § 8071(3)(B) (Pamph. 1998). Procedurally, enactment of such rules entails a three-step process. First, the agency "provisionally" adopts rules that are designated as major substantive. Second, the "provisionally" adopted rule is provided to the Legislature for its approval, rejection or approval with conditions. Third, if the Legislature approves the rule, the agency "finally" adopts the rule after making any revisions required by the Legislature. *See generally id.* § 8072.

final on April 22, 1998. (Order Finally Adopting Rule and Statement of Factual and Policy Basis, or "Final Rule," App. at 22-24.) A complete copy of the Final Rule is attached to the Commission's April 22, 1998 Order. (App. at 25-35.) The Final Rule became effective on June 6, 1998. (App. at 35.)

CMP challenged the PUC's Final Rule before the Maine Supreme Judicial Court, sitting as the Law Court. CMP objected on First Amendment grounds to three aspects of the Final Rule: Section 6(B), as an unconstitutional prior restraint;[3] Section 7, which compels utilities to disseminate the PUC's educational speech; and Section 6(C), which permits the PUC to "correct" and enjoin the utilities' educational speech.

The Maine Court recognized that speech aimed at educating the public about industry restructuring is core, non-commercial speech protected under the First Amendment. (App. at 9-10.) The Court also recognized that the challenged provisions of the Final Rule are content-based regulations. (App. at 16-17.) In so concluding, the Court recognized that "[i]n effect, the [PUC] does not want any speech to go to consumers regarding restructuring and

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[3] Section 6(B) of the Final Rule provided that:

> B. ***Informational Filings***. Electric and transmission and distribution utilities shall file with the Commission, for informational purposes only, any materials that are part of or related to utility-sponsored educational activities. The materials shall be filed, whenever possible, at least three weeks before the commencement of the activity of which the materials are a part or to which the materials relate.

(App. at 32-33.) Thus, the regulation required utilities to submit their educational speech to the PUC for review three weeks before the utilities could utter the speech.

retail access unless it is speech with which [it] agrees." (App. at 14.)

Given these findings, the Maine Court agreed with CMP that Section 6(B) was an unconstitutional prior restraint, because it prevented utilities from publicly disseminating their speech while the PUC reviewed the speech during a three-week waiting period. (App. at 16.) Nevertheless, the Court sustained Sections 7 and 6(C), concluding that they met the strict scrutiny test for upholding content-based restrictions. The Law Court found that these two provisions are narrowly tailored to serve a compelling governmental interest. (App. at 19, 20.)

More specifically, the Law Court found that Section 7 of the Rule – which compels utilities to disseminate and be associated with whatever the PUC determines is "educational" – met the strict scrutiny test because the governmental speech required to be disseminated "would be objective descriptions of the deregulation of the electric industry and the retail access choices of consumers." (App. at 18.) The Court declared: "the alternative of directly mailing [the Commission's own] education materials to consumers would hinder the Commission's achievement of its interests, because it would increase the possibility of consumers receiving differing information from different sources," thus creating "consumer confusion." (App. at 18, 19.)

The Law Court also relied on the "consumer confusion" theme in concluding that the corrective speech and injunction provisions in Section 6(C) passed constitutional muster. The Court reasoned:

> This requirement is narrowly focused only on materials that are misleading or deceptive.

> Although the Commission could disseminate its own materials to clarify misleading, inaccurate or deceptive statements by a T[ransmission] & D[istribution] facility as the transition to deregulation occurs, such action could increase consumer confusion as the consumers receive different messages from different sources.

(App. at 20.)

In sum, the Maine Court has declared that the regulator can force, correct and enjoin core speech on the subject matter of restructuring, because (1) such speech is "objective," and (2) avoiding "confusion" from a non-governmental, core speech message constitutes a compelling state interest.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE MAINE SUPREME JUDICIAL COURT, APPLYING A BROAD, UNDEFINED "OBJECTIVITY" TEST AND FINDING AVOIDANCE OF PUBLIC CONFUSION A COMPELLING STATE INTEREST, CONFLICTS WITH THIS COURT'S WELL-ESTABLISHED FREE SPEECH JURISPRUDENCE.

The issue presented in this case is to what extent the State can compel, correct and enjoin core speech. The Law Court upheld such restrictions on core speech about electric industry restructuring for two reasons: (1) educational speech on restructuring, while core, constitutes "objective descriptions of the deregulation of the electric industry and the retail access choices of consumers;" and (2) avoidance of public confusion due to differing messages on the subject of restructuring is a compelling state

interest. Both prongs of this justification for the challenged speech restrictions violate fundamental First Amendment jurisprudence.

A. THE MAINE COURT'S OBJECTIVITY TEST VIOLATES SUPREME COURT PRECEDENT.

1. Maine's New Objectivity Test Violates Many Decisions, Most Directly, *Pacific Gas.*

When the Maine Law Court upheld the PUC's Rule because it found that the speech involved would be "objective," it improperly mixed core and commercial speech concepts. While acknowledging that the speech at issue is core, not commercial, the Law Court nevertheless treated the speech as if it were commercial, due to what the Maine Court saw as the "objective" nature of the speech. This reliance on the "objective" nature of non-commercial speech to permit compulsion, correction and injunction violates well-established Supreme Court precedent.

This Court has, on occasion, allowed compulsion, correction and perhaps enjoinder of *commercial* speech, because it has found the basis for protection of commercial speech different from that of core speech. Commercial speech is protected in the first place because it can provide useful information upon which the consumer can engage in an informed sales transaction. *See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 563-64 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-65 (1976). Deceptive commercial speech provides no such benefit; consequently, it enjoys no First Amendment protection. *Virginia State Board of Pharmacy*, 425 U.S. at 771; *Central Hudson*, 447 U.S. at 563. *See also 44 Liquormart,*

Inc. v. Rhode Island, 517 U.S. 484, 496 (1996); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431 (1993) (Blackmun, J., concurring).

In contrast, protection of *core* speech is based upon the fundamental proposition that a democratic society is best served by a marketplace of ideas in which all can speak freely – that correction of erroneous core speech should be achieved not by prohibition, but by more speech. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas. . . . "); *Brown v. Hartlage*, 456 U.S. 45, 58, 59 (1982) (broken campaign promise protected under First Amendment; "[t]he State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-272 (1964) ("erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive' " (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963))). The Court in *Brown* stated:

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment "we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas. . . . "

Brown, 456 U.S. at 61 (citations omitted).

Thus, unlike commercial speech, accuracy is not a touchstone for protection of core speech:

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving the truth on the speaker. The constitutional protection does not turn upon "the truth, popularity or social utility of the ideas and beliefs which are offered."

New York Times Co., 376 U.S. at 271 (citations omitted). The Court in *New York Times* went on to quote the following statement of Mill in *On Liberty*:

> * * * (T)o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion * * * all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.

New York Times, 376 U.S. at 272 n.13 (quoting Mill, *On Liberty* (Oxford: Blackwell, 1947) (omissions are Court's)).

For the same reasons, unlike commercial speech, the State cannot compel core speech. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (New Hampshire cannot require citizens to display "live free or die" motto on vehicle license plate under First Amendment). *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("one important manifestation of the principle of free speech is that one who chooses to speak

may also decide what not to say"); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 796-797 (1988) (rejecting the argument that the First Amendment interest in compelled speech is different from the interest in compelled silence); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943) ("Involuntary affirmation c[an] be commanded only on even more immediate and urgent grounds than silence."); *see also Glickman v. Wileman Bros & Elliot*, 521 U.S. 457, 481 (1997) (Souter, J., dissenting) ("compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny").

Given these basic precepts, it does not matter whether the compelled or corrected speech involves any factual component, because a necessary aspect of free expression is the right to pick and choose which facts to emphasize and which to avoid. *Hurley*, 515 U.S. at 573 ("Indeed, this general rule that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."); *Riley*, 487 U.S. at 797-98 (both "compelled statements of opinion" and "compelled statements of 'fact' " are forms "of compulsion burden[ing] protected speech").

The Maine Court's "objectivity" test flies in the face of this well-established precedent and the Supreme Court's commercial-core speech delineation, by broadening the less protected commercial speech category to embrace all "objective" speech – as that term is apparently defined by the State. While such an objectivity test violates fundamental First Amendment principles as noted above, the ruling with which the Law Court's test

most obviously conflicts is *Pacific Gas & Electric Co. v. California PUC*, 475 U.S. 1 (1986).

There, this Court struck down a California commission order requiring an electric utility to allow the group Toward Utility Rate Normalization ("TURN") to place inserts in Pacific Gas' billing envelopes. In so ruling, the plurality noted that such compulsion could result in reducing Pacific Gas' inclination to contribute to the marketplace of ideas:

> [B]ecause access [to Pacific Gas' billing envelope] is awarded only to those who disagree with [Pacific Gas'] views and who are hostile to [Pacific Gas'] interests, [Pacific Gas] must contend with the fact that whenever it speaks out on a given issue, it may be forced – at TURN's discretion – to help disseminate hostile views. [Pacific Gas] "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas that the First Amendment seeks to promote.

Pacific Gas, 475 U.S. at 14 (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974)).

The *Pacific Gas* plurality also found that the California commission's compelled dissemination order violated Pacific Gas' right to free speech by requiring the utility to associate itself with speech with which it might not agree.[4] The Court reasoned that if TURN were permitted to use Pacific Gas' property (*i.e.*, its billing envelope) to propagate its message, and Pacific Gas did not agree with

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[4] Justice Burger, who wrote a separate concurring opinion, would have decided the *Pacific Gas* case solely on this ground. *Pacific Gas*, 475 U.S. at 21-22 (Burger, C.J., concurring).

that message, then Pacific Gas would, as a practical matter, be forced either to appear to agree with TURN's viewpoint or to respond to TURN's assertions. *Pacific Gas*, 475 U.S. at 15-16 ("Should TURN choose, for example, to urge [Pacific Gas'] customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect the utility business, [Pacific Gas] may be forced either to appear to agree with TURN's views or to respond" (citations and internal quotation marks omitted)). The Court concluded that this "kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster" and that "the choice to speak includes within it the choice of what not to say." *Id.* at 16.

Other courts and regulatory commissions have also recognized that compelled access to a utility's billing envelope violates the First Amendment. *See, e.g., Central Illinois Light Co. v. Citizens Utility Bd.*, 827 F.2d 1169 (7th Cir. 1987) (invalidating state statute forcing utilities under threat of criminal prosecution to afford access to utility's billing envelope to consumer interest group); *In re Open Network Architecture*, 145 P.U.R.4th 450 (Or. P.U.C. 1993) (provision in proposed agency rule that would permit enhanced service providers access to billing envelopes of local exchange carriers "raises serious constitutional questions involving restrictions on protected free speech rights and should be deleted").

Both lines of reasoning applied in *Pacific Gas* apply here. Knowing that the PUC has the right to invade utilities' billing envelopes at will, Maine utilities will be inclined to say nothing to educate citizens about restructuring – a political act – and thereby avoid "corrections" and injunction by the PUC. Additionally, Maine utilities

are compelled to allow the PUC to say whatever it wants in their billing envelopes, regardless of whether the utilities agree with the message. This, in turn, can compel the utilities to voice their disagreement, which can then, in turn, spiral into more "corrections" and injunctions from the PUC.

While *Pacific Gas* involved compelled association with core speech from third parties, forced association with the PUC's speech is equally, if not more, repugnant. As *Wooley, supra*, demonstrates, compelled dissemination of the government's core speech is even more oppressive than dissemination of third-party speech. *See Wooley*, 403 U.S. at 715 (in requiring compelled speech of a governmental view – live free or die – "the State 'invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control' " (citing *Barnette*, 319 U.S. at 642)).

The Maine Court's "objectivity" test not only violates this broad precedent, but it is completely unworkable. What does "objective" mean? Who decides whether speech is "objective"? Since nothing in the actual language of the Rule or its enabling statute even references an "objectivity" limitation, any definition of this judicial gloss is apparently left to PUC to interpret as it wants. Thus, the State decides what "objective" means – as the Maine Court observed, the very same State that "does not want any speech to go to consumers regarding restructuring and retail access unless it is speech with which [it] agrees." (App. at 14.)

This Court has never distinguished between "objective" and "subjective" speech in the core speech context for good reason. "Objective" speech is as determined by the speaker and the listener. One cannot base degrees of

First Amendment protection on whether core speech contains "facts" or is "true." A pro-choice speaker, will, for example, provide what she believes is an "objective" marshalling of relevant facts that support her political position. A pro-life speaker will do the same, marshalling a different set of facts. The selection one makes of which facts to disseminate, and how one describes a political act such as deregulation, involves choices and values. As noted above, in cases like *Hurley* and *Riley*, compulsion of opinion and "fact" both share the same constitutional infirmities.

In sum, content-based governmental restrictions on who can communicate what core message is exactly the sort of abuse the First Amendment was designed to prevent. Educational speech is never merely "objective." To "educate" comes from the Latin "ducere" – to lead. Its purpose is thus by definition to lead the pupil in a desired direction – it is not neutral and benign. This point is particularly obvious here, when the subject is an issue of public concern as fundamental as the restructuring of a key component of the economic infrastructure of the state and the nation. The Law Court's decision is clearly erroneous, and violates well-established First Amendment precedent.

B. AVOIDANCE OF PUBLIC CONFUSION IS NOT A COMPELLING STATE INTEREST PERMITTING SUPPRESSION OF CORE SPEECH.

The second fundamental danger in the Law Court's opinion is its approval of "avoidance of confusion" on a political subject – energy sector restructuring – as a compelling governmental interest. Under the existing jurisprudence of this Court, as noted above, such an "interest"

is not only not compelling, but it is not protectable at all. The suppression of different views on a political subject strikes at the heart of free speech protection. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

Even with respect to less protected, commercial speech, recent federal court decisions have held that potential confusion of the public does not adequately support regulation. *See Pearson v. Shalala*, 164 F.3d 650, 658-59 (D.C. Cir. 1999) (rejecting government's conclusory assertion that consumers will be confused by proposed health claims accompanied by government-imposed disclosures as justification for preferring suppression over disclosure in commercial speech context); *Washington Legal Found. v. Friedman*, 13 F. Supp.2d 51 (1998) ("To endeavor to support a restriction upon [even commercial] speech by alleging that the recipient needs to be shielded from that speech for his or her own protection . . . is practically an engraved invitation to have the restriction struck.").

As this Court stated in *Virginia Pharmacy Board* when it held that a government's zeal to protect its citizens from "too much information" could not withstand First Amendment scrutiny:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather

> than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers from its misuse if it is freely available, that the First Amendment makes for us.

Virginia Pharmacy Bd., 425 U.S. at 770.

In sum, the State does not (indeed, cannot) have a compelling interest in monopolizing the marketplace of ideas in order to avoid public "confusion" on an issue of public concern.

C. THE MAINE COURT'S TEST CONFLICTS WITH SUPREME COURT PRECEDENT REQUIRING A NARROW TAILORING OF REGULATIONS RESTRICTING CORE SPEECH.

The Maine Court's misinterpretation of the strict scrutiny test for content-based regulation of core speech not only manifests itself in its application of an objectivity test, and in recognition of avoidance of confusion as a compelling interest, but also in misapplication of the "narrowly tailored" prong of the strict scrutiny test.

The Law Court's conclusion that the PUC is not required to disseminate its own speech to counter utility core speech conflicts with multiple Supreme Court decisions. *See, e.g., Riley*, 487 U.S. at 800 (statute requiring professional fundraisers to provide financial disclosure information to target of solicitation is not narrowly tailored where state itself can provide citizens with financial information instead of burdening fundraisers' speech); *Pacific Gas*, 475 U.S. at 19 (although state has compelling interest in fair and effective utility regulation, order requiring utility to disseminate core speech of third party is not narrowly tailored means of serving that interest

where state can assist third party's ability to participate in regulatory proceedings by awarding costs and fees).

The Maine Court failed to consider that the PUC can serve its interest in educating citizens about deregulation without burdening utilities' core speech. For example, the PUC can (and does) provide educational information on its Internet website.[5] More directly, the PUC could also mail its consumer education materials to CMP's customers using the PUC's own envelopes. In fact, the PUC established a funding mechanism for its consumer education program that could be used for this purpose. (App. at 30.) The availability of these means of educating consumers, which reduce any direct burden on utilities' First Amendment rights, prohibits the PUC from using its more heavy-handed means which impinge directly upon utilities' protected core speech.

D. OTHER JURISDICTIONS HAVE REACHED SIMILARLY INCORRECT CONCLUSIONS AND THE POTENTIAL IMPACT OF THE LAW COURT'S DECISION IS BROAD.

Leaving the Maine Court's misapplication on the books would provide regulators throughout the nation a blueprint for ignoring the stringent requirements of the "narrowly tailored" prong. The result would be an effective circumvention of this Court's ruling in *Pacific Gas* and its progeny. Not only would speech on the subject of restructuring be stifled, but, logically, the Law Court's reasoning could be used to compel, correct and enjoin

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[5] The PUC's website, which is at <http://janus.state.me.us/mpuc/>, contains a link to the PUC's on-line consumer education materials.

any core speech from a regulated entity. The Maine Court's decision cannot be ignored as an isolated, wrong-headed aberration. Other regulators and courts are heading down the same dangerous and unconstitutional path.

As noted by the Law Court in its decision (App. at 2), Maine is not alone in enacting restructuring legislation.[6] The Law Court's decision stands for the proposition that utilities' billing envelopes can be used by the State to force utilities to disseminate and associate with a State's educational speech on the topic of restructuring. Given the broad legislative changes and profound impact on the public effected by restructuring, States across the country will no doubt conclude that the utility billing envelope and other property of the utility constitute efficient, effective and Constitutionally acceptable forums to communicate the States' viewpoint on this and other political issues.[7] The Maine decision thus provides State PUCs with a basis for hopscotching around this Court's decision in *Pacific Gas*.

Indeed, the Law Court is not the only authority to stifle restructuring speech. Like the Maine Court, other courts and regulators have sidestepped *Pacific Gas*. *See, e.g., South River Power Partners, L.P. v. Pennsylvania PUC,*

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[6] According to statistics maintained by the Energy Information Administration, 21 states (including Maine) have already enacted electric industry legislation, three states have issued comprehensive regulatory orders and the 26 remaining states and the District of Columbia have ongoing agency or legislative investigations pending. *See* <http://www.eia.doe.gov/cneaf/electricity/chg_str/regmap.html>.

[7] For example, the Maine Court's decision was discussed in the News Digest section of *Public Utilities Fortnightly*, vol. 137, no. 17 (Sept. 15, 1999), a magazine targeted to public utility executives and regulators.

673 A.2d 422 (Pa. Commw. Ct. 1996) (distinguishing *Pacific Gas* and affirming commission order that requires utility to distribute to ratepayers through its billing envelope cogenerator's notice of proposed sale of electricity to utility); *In re New England Tel. & Tel. Co.*, 192 P.U.R. 4th 1, 17-21 & n.115 (Vt. P.S.B. 1999) (distinguishing *Pacific Gas* and requiring telephone utility to carry in its telephone directory "information" describing competitive local exchange companies).

Like the Law Court, Pennsylvania's utility commission appears to rely on the "objective" nature of educational materials in defending its consumer education program from First Amendment attack. Under Pennsylvania's consumer education scheme, electric distribution utilities are required by statute to implement a consumer education program designed to "provide consumers with information necessary to help them make appropriate choices as to their electric service." 66 Pa. C.S. § 2807(d)(3). The utility's education program "shall be subject to approval by the commission." *Id.* When the major electric utility in Pennsylvania declined to be involved in the consumer education program based on First Amendment concerns, the commission stated:

> PECO apparently believes that under the First Amendment . . . only it may determine the scope and content of its consumer education plan. . . . [The Consumer Education program] will be designed to disclose basic, objective information about the legal mandate for changes in the electric industry and to enable consumers to learn how to make informed choices. It will be competitively neutral. PECO's invocation of First Amendment concerns is misplaced. Commercial speech is protected by the First Amendment in order to promote the free flow of

> information so that a competitive market can function effectively. That is precisely why the Legislature requires a specific consumer education plan approved by the Commission as we make the transition from a regulated monopoly to a competitive market. The consumer education plan is designed to disclose basic, factual information about the law approved by the Legislature and consumer rights and responsibilities under the Act so that consumers can successfully navigate the transition to a competitive generation market. . . . The consumer education plan is intended to be purely objective disclosure of information and competitively neutral.

In re PECO Energy Co., 1998 WL 191234 at *12 (Pa. P.U.C. Feb. 26, 1998). Thus, not only has the Pennsylvania commission adopted an "objective" test, but as this excerpt demonstrates, it has also erroneously concluded that the utilities' speech on restructuring is commercial speech. To make matters worse, the Pennsylvania PUC referred PECO to state prosecutors one year later because it believed that PECO's independent speech, which the PUC concluded was advertising, created "confusion" regarding customer choice. *See Mid-Atlantic Power Supply Ass'n v. PECO Energy Co.*, 194 P.U.R.4th 495 (Pa. P.U.C. 1999).

Beyond the specific issue of restructuring, moreover, the reasoning of the Law Court can apply to *all* regulated entities and *any* core speech subject matter. Any regulated entity can be compelled to carry the government's core speech on any topic, or to correct its own speech on any topic, or be enjoined from speaking on any topic – as long

as the speech is deemed by the State to be "objective."[8] *See, e.g., Scope Pictures, Inc. v. Kansas City*, 140 F.3d 1201, 1204-05 (8th Cir. 1998) (holding that city ordinance requiring motion picture arcade booth establishments to: (1) post city-approved signs describing the risks and methods of transmission of venereal disease and (2) make available to patrons city-approved pamphlets containing information on gonorrhea, syphilis and AIDS does not violate the First Amendment because "no political or ideological message is implicated in providing information about sexually transmitted diseases and unsafe sexual activities").

In sum, courts and regulators other than the Maine Court are eroding regulated entities' core speech rights.

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[8] Even beyond the sphere of regulated entities, the Maine Court's decision will fuel continuing confusion over the government's ability to compel an individual to be associated with another's ideology. For example, both the Connecticut Supreme Court and the Third Circuit have upheld compelled association with the American flag. *See Cotto v. United Technologies Corp.*, 1999 WL 810643 at *8 (Conn. Oct. 12, 1999) (holding that mandatory display of American flag at work station does not constitute compelled association in violation of the First Amendment); *Troster v. Pennsylvania State Dep't of Corrections*, 65 F.3d 1086, 1091 (3d Cir. 1995) (finding "no basis for concluding that the requirement that Troster wear the [American] flag patch on his [corrections] uniform compels him in effect 'to profess any statement of belief or to engage in any ceremony of assent to one.' " (quoting *Barnette*, 319 U.S. at 634)), *cert. denied*, 516 U.S. 1047 (1996).

II. THIS CASE PRESENTS AN IMPORTANT, UNRESOLVED QUESTION ON COMPELLED AND CORRECTABLE CORE SPEECH THAT SHOULD BE ANSWERED BY THIS COURT.

While the test applied by the Maine Court, focusing on "objectivity" and avoidance of public confusion, is clearly dangerous and wrong, the specific question raised in this case has not been resolved heretofore, and needs to be addressed and resolved correctly: what type, if any, of non-commercial speech can be subject to compulsion, correction and/or injunction?

In *Pacific Gas*, the Court suggested, without deciding, that some speech not traditionally thought of as commercial could still be compelled on a content basis. In striking down compelled dissemination of third-party core speech, Justice Powell stated:

> The Commission's order is thus readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated. The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See Zauderer v. Office of Disciplinary Counsel, 471 US 626, 651, 85 L Ed 2d 652, 105 S Ct 2265, 17 Ohio BR 315 (1985). Nothing in Zauderer suggests, however, that the State is equally free to require corporations to carry the message of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.

Pacific Gas, 475 U.S. at 12 n.12.

The Maine Court has apparently concluded that "objective" speech on the subject matter of retail access is

functionally like a notice of "changes in the way rates are calculated," and, therefore, subject to compulsion, correction and injunction, unlike other core speech. As noted above, the Pennsylvania regulator achieves the same result simply by defining such speech as less protected commercial speech. The instant case presents the question whether a category of core speech exists that may be so regulated, and, if so, how should that category be defined (or whether this category should be called, or treated as if it were, commercial speech).

Again, the Maine Court and utility regulators' definition of this less protected speech category – objective educational speech as defined by the State for the purpose of avoiding public confusion – is untenable and wrong. The specific information involved in the challenged Rule – speech on the subject matter of electric industry restructuring and retail access – is a matter of public concern and the subject of political debate. It does not and should not fall into any exception to the general rule protecting core speech from compulsion, correction or injunction.

In explaining why the Maine Court drew the line in the wrong place, however, this Court can clarify where that line should be. The whole question of how to categorize speech on the commercial-core continuum for the purposes of determining its degree of protection is one that this Court has increasingly identified as problematic. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 119 S. Ct. 1923, 1930 (1999) (observing that "petitioners as well as certain judges, scholars, and amici curiae have advocated repudiation of the *Central Hudson* standard and adoption of a more straight-forward and stringent test for commercial speech regulations" and noting that

the opinions of the Court in *44 Liquormart* demonstrate that "reasonable judges may disagree about the merits of such proposals"); *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring) (sharing J. Thomas' discomfort with the *Central Hudson* test, "which seems to me to have nothing more than policy institution to support it"); *Discovery Network*, 507 U.S. at 437 (Rehnquist, C.J., dissenting with White, J. and Thomas, J., joining) (according truthful, noncoercive commercial speech the full protection of the First Amendment will not erode the level of that protection to non-commercial speech); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of NY*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring with Brennan, J., joining) (stating that new test applied to commercial speech does not provide adequate protection for truthful, nonmisleading, noncoercive speech).

Even answering the question of what types of speech can be deemed "commercial," however, will not solve the broader, and more fundamental question presented here, as to what type of non-commercial speech, if any, can be subject to compulsion, correction or injunction, especially on the basis of its content.

At one end of the spectrum of non-commercial speech is political, ideological speech – unequivocally uncompellable, uncorrectable, and unenjoinable. On the other end lies the "legal disclosure" referenced by Justice Powell in footnote 12 of *Pacific Gas*. What type of speech falls into the latter category?

The concept of objectivity is not a completely foreign consideration in First Amendment jurisprudence. In *Virginia Pharmacy Board*, 425 U.S. at 771 n.24, the Court stated that there may be less need for protection of commercial speech (defined as speech that does "no more

than propose a commercial transaction") because, *inter alia*, "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary. . . . Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." *See also 44 Liquormart*, 517 U.S. at 499 (describing the *Virginia Pharmacy Board* decision as noting that "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones").

Here, however, the Maine Court has flipped this "objectivity" reasoning on its head. The Supreme Court has found that objective qualities in commercial speech provide one basis for allowing some regulation of commercial speech under some circumstances. The Maine Court takes this concept and concludes that, whenever the State defines speech as "objective," that speech, even though *non*-commercial, is subject not only to correction, but compulsion and injunction. The fear of silencing the speaker voiced in *Virginia Pharmacy Board* is instantly triggered by such a broad, undefined test.

The "objectivity" test combined with the recognition of avoidance of public confusion as a compelling governmental interest results in a test that is not only contrary to established precedent, but which gives free rein to State compulsion, correction and injunction of core speech. The result, effectively, is a test which protects speech based on the identity of the speaker. If the speaker is a regulated corporation, its core speech is subject to strict regulation. Such a test again ignores well-established Supreme Court precedence, and should not be countenanced. *See Pacific*

Gas, 475 U.S. at 17 n.14 (rejecting argument that the speaker's status as a regulated utility lessens its right to be free from state regulation that burden its speech); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.").

CONCLUSION

This Court should grant certiorari, first of all, to eliminate the Maine Court's test, which is dangerous, wrong and is being applied by a growing number of regulators. The Court should then provide guidance on what test actually applies. Otherwise, all regulated entities, not just utilities, risk becoming billboards for their regulators' core speech, while stifling their own speech in order to avoid "confusion" over the regulators' "objective" message.

Respectfully submitted,

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CENTRAL MAINE POWER CO.

v.

PUBLIC UTILITIES COMMISSION.

Docket No. PUC-98-290.

Supreme Judicial Court of Maine.
Argued Dec. 1, 1998.
Decided July 29, 1999.

Catherine R. Connors (orally), William D. Hewitt, Pierce Atwood, Portland, for appellant.

Andrew Ketterer, Attorney General, Elizabeth J. Wyman, Asst. Atty. Gen., (orally), Joanne B. Steneck, Public Utilities Commission, Augusta, for appellee.

Eric J. Bryant, Maine Public Advocate, Beth Nagusky, Independent Energy Producers of Maine, Augusta, Eric J. Uhl, Moon, Moss, McGill, Hayes & Shapiro, P.A., Portland, for Maine Civil Liberties Union, amici curiae.

Before CLIFFORD, RUDMAN, DANA, and SAUFLEY, JJ.

CLIFFORD, J.

[¶ 1] Central Maine Power Company (CMP) appeals the Public Utilities Commission's promulgation of a rule (Commission Rule) requiring electric transmission and distribution (T & D) facilities to file with the Commission any educational materials the T & D facilities plan to distribute to the public in regard to retail access to electricity generation services. CMP contends, inter alia, that: (1) the Commission Rule regulates noncommercial core

speech; (2) the Commission Rule's section 6(B) pre-dissemination submission requirement constitutes an unconstitutional prior restraint on core speech; and (3) the Commission Rule's section 7 inclusion and correction requirements constitute unconstitutional content-based restrictions on core speech. Although we find no constitutional infirmity in section 7 of the Commission Rule, we agree that the pre-dissemination submission requirement of section 6(B) of the Commission Rule is an unconstitutional prior restraint on core speech and accordingly, we vacate that section of the Commission Rule.

I. RESTRUCTURING AND RETAIL ACCESS

[¶ 2] As have many other states, the Maine Legislature enacted legislation restructuring the state's electricity industry. *See* P.L.1997, c. 316; *see also* 35-A M.R.S.A. §§ 3201-3217 (Supp.1998). Beginning on March 1, 2000, Maine citizens will have the right to purchase electricity generation services from the competitive electricity generation provider of their choice. *See* § 3202(1). Under the current system, Maine residents purchase electricity from integrated, noncompetitive, regulated public utilities. Pursuant to the recent legislation, these investor-owned electric utilities are required to divest all assets relating to the generation of electricity. *See* § 3204(1). They will maintain their transmission and distribution assets, however, and will remain regulated as T & D facilities. The independent electricity generation providers will be licensed by the Commission, but otherwise will not be subject to regulation as public utilities. *See* §§ 3202(2), 3203(1), (2), (5). After March 1, 2000, T & D facilities "may not own,

have a financial interest in or otherwise control generation or generation-related assets[,]" except "to the extent that the [C]ommission finds that ownership, interest or control is necessary for the utility to perform its obligations as a transmission and distribution utility in an efficient manner." *See* § 3204(5), (6).

[¶ 3] The deregulated system does contemplate affiliations between competitive electricity generation providers and T & D facilities.[1] The statute, however, does not permit a T & D facility to "engage in joint advertising or marketing programs of any sort with its affiliated

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[1] Section 3205(1)(A) defines an "affiliated competitive provider" as "a competitive electricity provider whose relationship with a large investor-owned transmission and distribution utility qualifies it as an affiliated interest." An "affiliated interest" is defined as:

(1) Any person who owns directly, indirectly or through a chain of successive ownership, 10% or more of the voting securities of a public utility;

(2) Any person, 10% or more of whose voting securities are owned, directly or indirectly, by an affiliated interest as defined in subparagraph (1);

(3) Any person, 10% or more of whose voting securities are owned directly or indirectly, by a public utility;

(4) Any person, or group of persons acting in concert, which the [C]ommission may determine, after investigation and hearing, exercises substantial influence over the policies and actions of a public utility provided that the person or group of persons beneficially owns more than 3% of the public utility's voting securities;

(5) Any public utility of which any person defined in subparagraphs (1) to (4) is an affiliated interest.

35-A M.R.S.A. § 707(1)(A)(1), (4) (1988).

competitive provider" or "promote or market any product or service offered by its affiliated competitive provider." *See* § 3205(3)(J) (further prohibiting T & D facilities from promoting affiliated competitive electricity providers in any manner).

[¶ 4] The Legislature gave the Commission the express statutory authority to oversee the transition to the new deregulated system. The statute requires the Commission to establish rules regarding "consumer protection standards and standards to protect and promote market competition in order to protect retail consumers of electricity from fraud and other unfair and deceptive business practices." *See* § 3203(6). Particularly, the statute requires the Commission to adopt rules implementing an education program to inform consumers about the deregulation process. *See* § 3213(2).

[¶ 5] On November 3, 1997, the Commission issued a Notice of Rulemaking that set out the proposed Rule establishing a consumer education program, explained each section of the Rule, established a time and place for a public hearing, and identified the procedure for public comment. The notice stated that "the consumer education program is designed to facilitate informed decision making by consumers and to provide an objective and credible source of information to consumers." The costs of education programs undertaken by T & D facilities pursuant to the Commission guidelines may be recoverable through increases in current electricity rates, *see* proposed Commission Rule § 6(A). In December, CMP submitted comments to the proposed Commission Rule. CMP wrote, "Although CMP is willing to work with the Commission to educate the public on retail access issues, CMP is

concerned by the substantial restraints that the proposed rule would impose on an electric utility's First Amendment rights to free speech."

[¶ 6] The Commission conducted a public hearing on the proposed Rule on January 30, 1998. The Commission responded to some stated concerns, provisionally adopted the Rule, and then submitted the Rule to the Legislature for review and approval pursuant to 35-A M.R.S.A. § 3213(2)(C) and 5 M.R.S.A. §§ 8071-8074 (Pamph.1998). The Legislature authorized the final adoption of the Rule with only two minor changes. *See* Resolves 1997, c. 99. CMP filed this appeal pursuant to 35-A M.R.S.A. § 1320 (1988).

[¶ 7] The following sections of the Commission Rule are the subject of this appeal:

> § 6 UTILITY-SPONSORED EDUCATIONAL ACTIVITIES
>
> A. Ratemaking Treatment. The costs of utility-sponsored educational activities shall not be included in electric or transmission and distribution utility rates unless the utility demonstrates in a ratemaking proceeding that expenditures for utility-sponsored educational activities are reasonable in amount, reasonably effective, necessary and in the public interest.
>
> B. Informational Filings. Electric and transmission and distribution utilities shall file with the Commission, for informational purposes only, any materials that are part of or related to utility-sponsored educational activities. The materials shall be filed, whenever possible, at least three weeks before the commencement of the activity of which the

materials are a part or to which the materials relate.

C. Investigation. The Commission may investigate any utility-sponsored educational activity if it finds after a summary investigation that there are sufficient grounds to investigate whether the activity is misleading, deceptive or inaccurate. If after a public hearing, the Commission finds that the utility-sponsored activity is misleading, deceptive or inaccurate, it may by order require the utility to cease the activity and provide corrections of that activity.

§ 7 DISSEMINATION OF INFORMATION

The Commission may require that electric and transmission and distribution utilities disseminate information produced as part of the Commission's consumer education program. Information required to be disseminated by the utility may include correction of any utility-sponsored education activity to the extent such correction is required by the Commission as a result of an investigation, undertaken pursuant to section 6(C).

II. THE FIRST AMENDMENT RIGHT TO FREE SPEECH

[¶ 8] The First Amendment to the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom

of speech, or of the press. . . . "[2] U.S. Const. amends. I, XIV; *see Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The United States Supreme Court has interpreted the First Amendment as preventing governments from proscribing speech or expressive conduct solely on the basis of disapproval of the ideas expressed.[3] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Freedom from content-based regulation, however, is not absolute. Obscenity and speech tending to incite immediate breach of the peace do not enjoy any First Amendment protection. *See, e.g., Miller v. California*, 413 U.S. 15, 23-24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Commercial speech is entitled to a form of intermediate constitutional protection. *See Central Hudson Gas*

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[2] The Maine Constitution likewise reads, "Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press. . . . " Me. Const. art. 1, § 4. With respect to free speech rights, "[t]he Maine Constitution is no less restrictive than the Federal Constitution." *State v. Janisczak*, 579 A.2d 736, 740 (Me.1990).

[3] The Supreme Court has upheld reasonable time, place, or manner restrictions, but only if those restrictions "are justified without reference to the content of the regulated speech. . . . " *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citations omitted). We have also recognized the distinction between content-based restrictions and reasonable time, place, and manner restrictions. *See Janisczak*, 579 A.2d at 739 n. 6. Because the Commission will require the T & D facilities to change the content of the education materials with which the Commission disagrees, the parties agree the restrictions are content-based.

& Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-65, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Only "core speech" or "pure speech" is entitled to strict constitutional protection.[4] *See, e.g., R.A.V.*, 505 U.S. at 395, 112 S.Ct. 2538.

A. COMMERCIAL SPEECH v. CORE SPEECH

[¶ 9] Commercial speech is "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Elec.*, 447 U.S. at 561, 100 S.Ct. 2343, speech that relates to a particular product or service, *see Friedman v. Rogers*, 440 U.S. 1, 10, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979), or speech that "propose[s] a commercial transaction," *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 473-74, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)). On the other hand, core speech enjoying the fullest constitutional protection, involves "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes[,]" *Mills v. Alabama*, 384 U.S. 214, 218-19, 86

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[4] In recent Supreme Court cases, several justices, writing in concurrence, have suggested that the lower constitutional standard for commercial speech is inappropriate in circumstances when the state imposes a complete ban on information for paternalistic reasons. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523, 526, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (Thomas, J. concurring). Those concerns have not been raised in this case.

S.Ct. 1434, 16 L.Ed.2d 484 (1966), speech directed at educating the public, *see Thornhill v. Alabama*, 310 U.S. 88, 95, 102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), or more generally, speech addressing "matters of public concern," *id.* at 101-02, 60 S.Ct. 736.

[¶ 10] Speech will not be characterized as commercial speech solely because the speaker is a corporation. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777, 784, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). The First Amendment protects equally the free speech rights of corporate persons and natural persons.[5] *See id.* The identity of the source does not determine the level of protection the First Amendment affords the speech. *See id.* Furthermore, speech does not automatically lose any constitutional protection solely because it involves a commercial subject. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 761, 96 S.Ct. 1817. Commercial speech must be distinguished from core speech based on its content. *See id.* Speech involving purely factual material of public interest is fully protected by the First Amendment, even if the subject of the speech is a commercial matter. *See id.* at 761-62, 96 S.Ct. 1817.

[¶ 11] Because the Commission Rule at issue is directed at "utility-sponsored educational activities," which by definition are designed to educate consumers about retail access in a deregulated system, *see* Commission Rule § 2(D), non-commercial core speech is what is

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[5] The speech of heavily regulated monopolies likewise is protected by the First Amendment. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 n. 1, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

being regulated. The statute forbids T & D facilities from promoting an affiliated competitive provider in any manner. *See* 35 M.R.S.A. § 3205(3)(J). To be in compliance with the law, a T & D facility will merely educate the public about the deregulated system and their future right to purchase electricity generation services from competitive providers, and will not disseminate educational materials directly implicating the facility's economic interests or proposing a commercial transaction to the consumers who receive the materials. Education about deregulation is a matter of state public concern. That the subject matter of the educational materials is commercial does not reduce its constitutional protection. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 761, 96 S.Ct. 1817. The Commission Rule essentially prohibits educational materials from containing commercial speech.[6]

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[6] Prior to the enactment of the Commission Rule, CMP designed a brochure to answer consumer questions about deregulation. The materials educate the public about deregulation. They do reference CMP's affiliates generally, but not by name. In response to the question, "Can I decide to continue purchasing power from CMP?," the brochure states, "Customer[s] may be able to purchase electricity from an affiliate of CMP but Maine's law prohibits a CMP marketing affiliate from selling more than 33% of the kilowatt hours sold in its current service territory. If 33% is reached, you will have to find another supplier." In response to the question. "Who will be selling electricity?," the brochure states, "New, unregulated energy companies associated with CMP and Bangor Hydro can offer electricity to you, as long as they don't provide more than 33% of the electricity sold in their current territories." Those are the only two references to affiliates of CMP. Given the overall educational value of these materials, it would be difficult to characterize them as commercial speech. *See Pacific Gas & Elec. Co. v. PUC*, 475 U.S. 1, 8-9, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986)

B. PRIOR RESTRAINTS ON CORE SPEECH

[¶ 12] The Supreme Court has explained that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill*, 310 U.S. at 101-02, 60 S.Ct. 736. The concept of prior restraint refers to "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, 4-14 (1984)). Writing a dissent in *Alexander*, Justice Kennedy stated, "In its simple, most blatant form, a prior restraint is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its contents." *Id.* at 566, 113 S.Ct. 2766; *see also Kingsley Books v. Brown*, 354 U.S. 436, 441, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957) (stating that prior restraints must "be closely confined so as to preclude what may fairly be deemed licensing or censorship").

[¶ 13] Because prior restraints have an immediate and irreversible sanction of suppressing speech before it occurs, there is a heavy presumption against their constitutional validity. *See Nebraska Press Ass'n v. Stuart*, 427

(electric company newsletter that included energy saving tips, stories about wildlife conservation, recipes, and billing information received full constitutional protection because newsletter extends well beyond speech that proposes business transaction and discusses matters of public concern).

U.S. 539, 559, 589, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (Brennan, J. concurring); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). Prior restraints on speech can be unconstitutional, even if subsequent redress of harm is not prohibited. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Prior restraints are only upheld in exceptional circumstances where the restraint prevents the disclosure of information that would cause irreparable damage to the country in a time of war or would incite violence, *see id.* at 716, 51 S.Ct. 625, or where, in the case of obscenity, procedural safeguards are in place to "reduce the danger of suppressing constitutionally protected speech," *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

[¶ 14] The Commission Rule's requirement that educational materials be submitted to the Commission three weeks prior to dissemination constitutes a prior restraint on core speech.[7] *See Organization for a Better Austin*, 402

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[7] The Commission contends that the prior restraint doctrine is inapplicable to regulated utilities. The Supreme Court has not directly applied the prior restraint doctrine in a regulated utility context. In *Central Hudson Gas and Electric*, the Supreme Court invalidated the Public Service Commission order banning advertising that promotes the use of electricity. *See* 447 U.S. at 569-570, 100 S.Ct. 2343. The Supreme Court, however, noted that the Public Service Commission "might consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy." *Id.* at 571 n. 13, 100 S.Ct. 2343. We read this not as a suggestion that there is an exception to the prior restraint doctrine for highly regulated industries, but rather as being based on the commercial nature of the speech because, as the court explained, "commercial

U.S. at 418-20, 91 S.Ct. 1575 (invalidating order enjoining organization from distributing leaflets in the town critical of local real estate agent as a prior restraint on speech). Section 6(B) of the Commission Rule requires T & D facilities to submit their education materials to the Commission "for informational purposes only . . . whenever possible, at least three weeks . . . " prior to disseminating the materials to the public. Presumably, the T & D facility cannot disseminate the materials during this three week period. Thus, although the Commission's restriction on the publication of the materials is temporary, it nevertheless is a prior restraint on the utilities' speech.

[¶ 15] Section 6(B) of the Commission Rule applies when a public hearing is concluded within the three week period and the Commission determines that corrections to the educational materials are warranted. After receiving the materials, the Commission will conduct a summary investigation to decide if a public hearing is needed to evaluate whether the subject matter of the materials is appropriate for publication. *See* Commission Rule § 6(C). If a public hearing is held and the Commission determines that the materials are misleading, inaccurate, or deceptive, the Commission will require the T & D facility to correct the portions of the educational materials of which the Commission disapproves. *Id.* If the hearing is completed within the three week period and changes are necessary, the T & D facility will be required to correct its

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speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it." *Id.*

materials prior to their initial dissemination.[8] As is contended in the amicus curiae brief, "In effect, the [Commission] does not want any speech to go to consumers regarding restructuring and retail access unless it is speech with which [it] agrees."

[¶ 16] The Commission contends that the phrase "whenever possible" precludes the Rule from being characterized as a prior restraint. Prior restraints are prohibited because they have the effect of suppressing speech before it occurs. *See Nebraska Press Ass'n*, 427 U.S. at 559, 589, 96 S.Ct. 2791. The "whenever possible" language will not alter that effect. CMP does not know how the Commission will interpret the phrase "whenever possible." To ensure it has complied with the Commission Rule, CMP must submit the materials three weeks prior to the dissemination or justify its failure to do so.

[¶ 17] The Commission further contends that section 6(B) does not constitute a prior restraint because the Rule and the applicable statute do not impose any sanctions

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[8] After the three week period, a T & D facility is free to disseminate its materials, even if a public hearing is pending. In circumstances when a public hearing cannot be concluded within the three week period, the T & D will have disseminated the materials prior to any determination by the Commission that the content of the materials must be changed. Requiring the T & D facility to change the contents of its material after dissemination is technically subsequent punishment, not a prior restraint. Still, the T & D facility will have been forced to postpone its publication during that three week period. The ultimate ability to disseminate the desired communication does not change the fact that there is a period of time during which the T & D facility would be denied the ability to exercise its free speech rights.

for noncompliance and the Rule explicitly provides that the submission is "for informational purposes only." That phrase does not save the Commission Rule from being characterized as a prior restraint. The Commission's comments to section 6(B) of the Rule, as the comments appear in the Commission's order provisionally adopting the Rule, state:

> The purpose of subsection 6(B) is to inform the Commission prior to implementation of utility-sponsored educational activities so that the Commission can work with the utility to avoid inconsistent or contrary educational messages. We note that although the provision does not require approval by the Commission, we would expect the utility to cooperate with the Commission in redrafting messages to avoid confusion to consumers.

As CMP contends, because of the ongoing nature of the regulatory relationship between T & D facilities and the Commission, the language of section 6(B) of the Commission Rule, when combined with the language of sections 6(C) and 7, is essentially the same as a requirement of Commission approval. Although there is nothing to suggest that the Commission has or will misuse its power in this area, coercion, persuasion and intimidation could effectively suppress speech even though formal legal sanctions are not available or are not utilized.[9] *See Bantam*

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[9] CMP suggests that civil penalties totaling up to $1,000 may be available for failure to comply with Commission requirements. *See* 35-A M.R.S.A. § 1508 (1988). The Commission notes, however, that the general penalty provisions of Title 35-A are not applicable to violations of this Rule and were not even mentioned during the promulgation of the Rule.

Books, Inc. v. Sullivan, 372 U.S. 58, 66-67, 68-70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) (prior restraint even though entity " 'free' to ignore the Commission's notices, in the sense that [its] refusal to 'cooperate' would have violated no law."). Section 6(B) of the Commission Rule constitutes an unconstitutional prior restraint on core speech.[10]

C. CONTENT-BASED RESTRICTIONS ON CORE SPEECH

[¶ 18] Section 7 of the Commission Rule provides:

> The Commission may require that electric and transmission and distribution utilities disseminate information produced as part of the Commission's consumer education program. Information required to be disseminated by the utility may include correction of any utility-sponsored education activity to the extent such correction is required by the Commission as a result of an investigation, undertaken pursuant to section 6(C).[11]

Requiring a T & D facility to include the Commission's consumer education materials with its own education materials is a content-based restriction on speech.

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[10] CMP also contends that the language of section 6(B) of the Commission Rule is unconstitutionally vague. Because we strike the language as an unconstitutional prior restraint on core speech, we do not address this issue.

[11] Section 6(C) of the Commission Rule provides, "If after a public hearing, the Commission finds that the utility-sponsored activity is misleading, deceptive or inaccurate, it may by order require the utility to cease the activity and provide corrections of that activity."

Requiring a T & D facility to correct the content of its speech likewise is a content-based restriction on speech. As the Supreme Court has explained, mandating speech that a speaker otherwise would not make necessarily alters the content of the speaker's speech. *See Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Content-based restrictions on core speech, however, may be constitutional if the restrictions are demonstrated to be narrowly tailored to serve a compelling state interest. *See R.A.V.*, 505 U.S. at 395-96, 112 S.Ct. 2538; *Hart v. Secretary of State*, 1998 ME 189, ¶ 9, 715 A.2d 165, 167-68, cert. denied, sub nom. *Hart v. Gwadosky*, ___ U.S. ___, 119 S.Ct. 1028, 143 L.Ed.2d 38, 67 USLW 3524 (U.S.Me. Feb.22, 1999) (No. 98-676).

1. THE INCLUSION REQUIREMENT

[¶ 19] Relying on the United States Supreme Court decision in *Pacific Gas and Electric Co. v. PUC*, CMP contends that requiring T & D facilities to include Commission educational materials with the materials they disseminate to their customers is an unconstitutional content-based restriction on non-commercial core speech. We disagree.

[¶ 20] In *Pacific Gas*, the Supreme Court struck down a California Utility Commission requirement that a privately owned utility include in its billing envelopes leaflets designed by a third party, outlining positions with which the utility disagreed. *See* 475 U.S. at 5-7, 106 S.Ct. 903. The Supreme Court noted that the California Commission's interest in fair and effective utility regulation

may be a compelling interest, but concluded that the California Commission's inclusion requirement was not narrowly tailored to achieve the Commission interests. *See id.* at 19-20, 106 S.Ct. 903.

[¶ 21] Several significant differences between Pacific Gas and the facts of this case, however, lead us to conclude that the requirements of the Commission Rule are narrowly tailored to serve the Commission's compelling interest. Like the California Commission in *Pacific Gas,* the Commission has a compelling interest in ensuring that consumers get information about deregulation of the electricity generation industry and retail access that is objective, accurate, and comprehensive given the potential for a high degree of customer confusion that can result from retail competition. Unlike the materials at issue in *Pacific Gas,* however, the subject matter of the material T & D facilities are forced to include within its billing envelopes is narrowly prescribed. In *Pacific Gas,* the utility was required to disseminate highly-opinionated political editorials of third parties that the utility considered to be directly contrary to its interests. *See id.* at 5-7, 106 S.Ct. 903. The materials that a T & D facility would be forced to include in its billing envelopes would be objective descriptions of the deregulation of the electricity generation industry and the retail access choices of consumers. The Commission stated, in support of its adoption of the Rule, "We do not expect that there will be major differences of opinion between the Commission and utilities about the kind of fact-based information that is at issue here." Furthermore, the materials will be generated by the body with the authority to regulate utilities and with the legislative mandate to develop educational

program regarding deregulation, not independent third parties. Finally, the alternative of directly mailing its education materials to consumers would hinder the Commission's achievement of its interests, because it would increase the possibility of consumers receiving differing information from different sources. Thus, the Commission Rule's inclusion requirement is narrowly tailored to serve the Commission's compelling interest.

2. THE CORRECTION REQUIREMENTS

[¶ 22] We have concluded that section 6(B)'s requirement that T & D facilities submit their educational materials to the Commission prior to dissemination is invalid. Section 6(C) of the Commission Rule, however, permits the Commission to hold a public hearing after dissemination and to order the T & D facility to correct materials the Commission finds to be misleading, deceptive, or inaccurate. Section 7 reaffirms that a T & D facility must disseminate the corrected materials to their consumers. CMP contends that these correction requirements unconstitutionally restrict the free speech rights of T & D facilities. We are unpersuaded by that contention.

[¶ 23] The correction requirements of section 6(C) remedy harm, rather than suppress speech, and thus avoid the constitutional infirmities of the prior restraint set out in section 6(B). Furthermore, the Commission has a compelling interest in "work[ing] with [T & D facilities] to ensure consumers get information that is objective, accurate, and consistent with [the Commission's consumer education] program messages[,]" given "the potential for a high degree of customer confusion that can

result from retail competition [.]" *See Pacific Gas*, 475 U.S. at 19, 106 S.Ct. 903. The requirement that the T & D facility correct any information that is misleading, inaccurate, or deceptive is narrowly tailored to serve this interest. This requirement is narrowly focused only on materials that are misleading or deceptive. Although the Commission could disseminate its own materials to clarify misleading, inaccurate, or deceptive statements by a T & D facility as the transition to deregulation occurs, such action could increase consumer confusion as the consumers receive different messages from different sources. Because the requirement that a T & D facility correct misleading, inaccurate, or deceptive materials after those materials have been disseminated serves to remedy harm, rather than suppress speech, in a manner that is narrowly tailored to achieve a compelling government interest, the requirement is constitutional.

III. EQUAL PROTECTION GUARANTEES

[¶ 24] The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[12] U.S. Const. amend. XIV. CMP contends that competitive electricity generation providers and nonelectric utilities,

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[12] Similarly, article I, section 6-A of the Maine Constitution states that "[n]o person shall be . . . denied the equal protection of the laws. . . . " The equal protection guarantees of these provisions are coextensive. *See Beaulieu v. City of Lewiston*, 440 A.2d 334, 338 n. 4 (Me.1982).

unlike T & D facilities, are permitted to disseminate educational materials regarding deregulation without prior submission to the Commission and without fear of correction or forced inclusion of Commission materials. This disparate treatment, according to CMP, violates equal protection guarantees.

[¶ 25] The Supreme Court has interpreted the Federal Equal Protection Clause to mean that "all persons similarly circumstanced shall be treated alike," reasoning that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *See Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (citations omitted). The entities to which CMP refers as being treated differently are not similarly situated entities. After deregulation, T & D facilities will remain regulated public utilities that fall within the ambit of the Commission's regulatory authority. Competitive providers of electricity generation services must by [sic] licensed by the Commission, but thereafter will not be directly regulated as public utilities. Furthermore, non-electric utilities such as gas utilities are not directly implicated by the deregulation of the electricity generation industry. Thus, the Equal Protection Clause is not implicated by the distinctions in the Commission Rule.

The entry is:

Section 6(B) of the Public Utilities Commission Rule is vacated. Remanded to the Public Utilities Commission.

STATE OF MAINE
PUBLIC UTILITIES
COMMISSION

Docket No. 97-583

April 22, 1998

PUBLIC UTILITIES
COMMISSION,
Rulemaking: Consumer
Education Program
(Chapter 302)

ORDER FINALLY
ADOPTING RULE AND
STATEMENT OF
FACTUAL AND
POLICY BASIS

WELCH, Chairman; NUGENT and HUNT, Commissioners

In this Order, we finally adopt a rule governing the implementation of a consumer education program to educate the public about the implementation of retail access for electricity and its impact on consumers. On January 30, 1998, the Commission provisionally adopted a rule implementing the consumer education program. Since the rule was denominated as a "major substantive" rule by 35-A M.R.S.A. § 3213(2)(C), it required Legislative approval under 5 M.R.S.A. §§ 8071-8074. In compliance with those provisions, the rule was submitted to the Legislature for approval. On March 30, 1998, Governor King signed into law Resolves 1997, ch. 99, which authorizes final adoption of the consumer education rule.

Although Chapter 99 authorizes the final adoption of the consumer education rule, it also requires that two changes be made in the language of the provisional rule. First, the final sentence of Section 5, paragraph B, of the proposed rule must be deleted and replaced with a requirement that the Commission must consider the recommendations of the advisory board when developing

and implementing the consumer education plan and program. Second, in Section 6, paragraph B, of the proposed rule, the word "only" must be inserted after the phrase "for informational purposes." The changes required by Chapter 99 have been made in the final rule.

Accordingly, we

ORDER

1. That the attached Chapter 302, Consumer Education Program is hereby finally adopted;

2. That the Administrative Director shall file the finally adopted rule and related materials with the Secretary of State; and

3. That the Administrative Director shall send copies of this Order and attached rule to:

A. All electric utilities in the State;

B. All persons who have filed with the Commission within the past year a written request for notices of rulemakings;

C. All persons on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;

D. All persons who have filed comments in Docket No. 97-583; and

E. The Executive Director of the Legislative Council (20 copies).

Dated at Augusta, Maine this 22nd day of April, 1998.

BY ORDER OF THE COMMISSION

/s/ Dennis L. Keschl
Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Hunt

65 – INDEPENDENT AGENCIES – REGULATORY

407 – PUBLIC UTILITIES COMMISSION

Chapter 302 CONSUMER EDUCATION PROGRAM; ELECTRIC INDUSTRY RESTRUCTURING

SUMMARY – This rule implements a consumer education program to educate the public about implementation of retail access and establishes a funding mechanism for the program.

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§ 1 PURPOSE OF RULE

This rule implements a consumer education program to educate the public about implementation of retail access and its impact on consumers.

§ 2 DEFINITIONS

A. ***Consumer Education Program.*** Consumer education program means the program, undertaken, sponsored or expressly authorized by the Commission, to educate consumers about the implementation of electric industry retail access and its impact on consumers.

B. ***Competitive Generation Provider.*** Competitive generation provider means a marketer, broker, aggregator or any other entity selling electricity to the public at retail.

C. ***Retail Access.*** Retail access means the right of a retail consumer of electricity to purchase generation services from a competitive generation provider.

D. ***Utility-Sponsored Education Activity.*** Utility-sponsored educational activity means an activity that is not part of the consumer education program and that is initiated and sponsored by an electric or transmission and distribution utility to educate consumers about retail access.

§ 3 PROGRAM SCOPE

A. ***Program Goals.*** The goals of the consumer education program are to:

1. increase consumer awareness of retail access and related issues;

2. facilitate informed consumer decision-making about choices resulting from retail access; and

3. provide to consumers an objective and credible source of information relating to retail access.

B. ***Consumers Targeted by Program.*** The consumer education program is targeted to residential consumers, small business consumers, and municipal consumers.

C. ***Topics for Education.*** The topics of the consumer education program shall include but are not limited to:

1. existence of competitive generation services
2. choice of competitive generation providers
3. regulated transmission and distribution services
4. system reliability
5. aggregation
6. standard offer service
7. itemized billing
8. stranded costs
9. uniform disclosure requirements
10. low-income bill payment assistance programs
11. renewable energy resource program
12. energy conservation programs
13. availability of "do-not-call" list

13. [sic] timeline for retail access

D. *Methods of Education.* The methods of education incorporated in the consumer education program may include, but are not limited to:

1. press releases and other press outreach methods
2. advertisements and public service announcements on television, radio, newspaper and other media
3. education delivered by community organizations
4. informational brochures and fact sheets
5. restructuring newsletters
6. direct mail and bill inserts
7. information clearinghouse at the Commission
8. Internet; Commission's home page on the world wide web
9. speakers' bureau
10. participation of community leaders in educational efforts
11. participation of large employers in educational efforts
12. public meetings
13. workshops for consumer groups
14. toll-free telephone hotline for questions about retail access
15. Booths at fairs and similar events

§ 4 FUNDING

A. *Level.* The consumer education program shall be funded up to $1,600,000.

B. *Source.* To fund the design and implementation of the consumer education program, electric or transmission and distribution utilities shall pay a special assessment based on a proportion of those utilities' gross revenues from regulated services. This assessment is a just and reasonable operating cost for ratemaking purposes and shall be recoverable from ratepayers. Utilities may defer amounts paid under this section with carrying costs until an appropriate ratemaking proceeding. These amounts may be recovered from ratepayers notwithstanding any provision of a utility rate cap plan.

C. *Special Assessment.*

1. *Amount.* Every electric and transmission and distribution utility subject to assessment under 35-A M.R.S.A. § 116 is subject to an additional assessment on its gross intrastate operating revenues for regulated services. This assessment shall produce no more than $200,000 in revenues in fiscal year 1997-98, no more than $600,000 in revenues in fiscal year 1998-99, no more than $600,000 in revenues in fiscal year 1999-2000, and no more than $200,000 in revenues in fiscal year 2000-01.

2. *Billing and Due Dates.* The assessment for fiscal year 1997-98 will be billed upon the effective date of this chapter and any enabling legislation, whichever is later. The assessment shall be due 30 days after the billing date. The assessments for subsequent fiscal years will be billed on May 1, and shall be due on July 1 of each year.

3. *Accounting.* The revenues produced from this assessment shall be used for the design and implementation of the consumer education program. These funds shall be raised and accounted for in accordance with the provisions of 35-A M.R.S.A. § 116, and shall be paid to the Treasurer of State and deposited in an account called the Public Utilities Commission Consumer Education Fund. Funds produced from this special assessment and not expended during any fiscal year may be carried over to the subsequent fiscal year. Any funds remaining in the Public Utilities Commission Consumer Education Fund at the conclusion of the program will be returned proportionally to assessed utilities by reducing their next annual assessment. The returned funds shall be flowed through to ratepayers in an appropriate ratesetting proceeding.

§ 5 IMPLEMENTATION

A. *Conduct of the Program.* The Commission shall design and implement the consumer education program. The Commission may contract for services for program design and implementation.

B. *Advisory Board.* The Commission shall form an advisory board, which shall include representatives of utilities, residential and nonresidential consumers, and competitive providers, to provide information, advice and assistance to the Commission, Commission Staff and any contractor the Commission may hire, pursuant to subsection A, in the development and implementation of the consumer education plan and program. The Commission shall appoint members to the board by April 1998. The Commission shall consider the recommendations of

the advisory board in developing and implementing the consumer education plan and program.

C. *Proposed Consumer Education Program Plan.* The Commission shall issue a proposed consumer education plan and provide an opportunity for public comment on its proposed plan. The Commission shall adopt a plan by August 4, 1998.

D. *Modification of Plan.* The Commission may modify its consumer education plan based on the results of its evaluation(s) performed pursuant to this rule.

E. *Program Duration.* The consumer education program shall continue through September 2000. The Commission may extend the program upon a finding that continuation of the consumer education program is in the public interest.

§ 6 UTILITY-SPONSORED EDUCATIONAL ACTIVITIES

A. *Ratemaking Treatment.* The costs of utility-sponsored educational activities shall not be included in electric or transmission and distribution utility rates unless the utility demonstrates in a ratemaking proceeding that expenditures for utility-sponsored educational activities are reasonable in amount, reasonably effective, necessary and in the public interest.

B. *Informational Filings.* Electric and transmission and distribution utilities shall file with the Commission, for informational purposes only, any materials that are part of or related to utility-sponsored educational activities. The materials shall be filed, whenever possible, at

least three weeks before the commencement of the activity of which the materials are a part or to which the materials relate.

C. *Investigation.* The Commission may investigate any utility-sponsored educational activity if it finds after a summary investigation that there are sufficient grounds to investigate whether the activity is misleading, deceptive or inaccurate. If after a public hearing, the Commission finds that the utility-sponsored activity is misleading, deceptive or inaccurate, it may by order require the utility to cease the activity and provide corrections of that activity.

§ 7 DISSEMINATION OF INFORMATION

The Commission may require that electric and transmission and distribution utilities disseminate information produced as part of the Commission's consumer education program. Information required to be disseminated by the utility may include correction of any utility-sponsored education activity to the extent such correction is required by the Commission as a result of an investigation, undertaken pursuant to section 6(C).

§ 8 PROGRAM RESEARCH, MONITORING AND EVALUATION; REPORTS TO THE LEGISLATURE

A. *Criteria for Monitoring.* The consumer education plan shall identify criteria the Commission will use to evaluate the consumer education program. The Commission may consider these criteria in determining

whether to modify the program. Criteria will include target levels for consumer understanding of issues relating to retail access.

B. *Research.* The Commission may conduct research to tailor the consumer education program to the needs of consumers and to reach the target-audience. Such research may include focus groups to test proposed messages and periodic surveys to assess program success and levels of consumer understanding of issues relating to retail access.

C. *Evaluation.* The Commission shall evaluate the effectiveness of the consumer education program in 1998 and at the conclusion of the consumer education program. The Commission may perform additional evaluations to determine the effectiveness of the consumer education program.

D. *Reports to Legislature.* The Commission shall file reports with the Legislature by December 31, 1999 and December 31, 2000 to report the results of the program evaluation. The Commission will provide this report as part of its annual restructuring report.

BASIS STATEMENT: The factual and policy basis for this rule is set forth in the Commission's Order Provisionally Adopting Rule and Statement of Factual and Policy Basis, Docket No. 97-583, issued on January 30, 1998 and in the Commission's Order Finally Adopting Rule and Statement of Factual and Policy Basis, issued on April 22, 1998. Copies of these Orders and Statements have been filed with this rule at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State

Street, 18 State House Station, Augusta, Maine 04333-0018.

AUTHORITY: 35-A M.R.S.A. §§ 104, 111, 301, 1301, 1303, 1306, 3201 and 3213(2).

EFFECTIVE DATE: This rule was approved as to form and legality by the Attorney General on May 7, 1998. It was filed with the Secretary of State on May 7, 1998 and will be effective on June 6, 1998.